Supreme Court, U.S.
FILED

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No.

# In the Supreme Court of the United States
## October Term, 1997

**CLEO SISK, et al (Exceptions of DANNY and LILLY MANN,**

*Petitioner,*

**vs.**

**STATE OF MISSOURI, et al. MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION**

*Respondent.*

***Petition for Writ of Certiorari to***
***The Missouri Court of Appeals Western District***

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

In a Missouri state Eminent Domain action, whether the trial court denied the property owner their fundamental due process constitutional rights for just compensation under the 5th and 14th Amendments of the United States Constitution in not allowing the property owners Expert Appraisal Witness to present competent and relevant valuation testimony of two essential comparable sales. Did such a denial constitute a taking of property without the payment of just compensation?

## PARTIES

All parties to the proceedings to the Sixteenth Judicial Circuit Court of Jackson County, Missouri, Division 16; the Missouri Court of Appeals, Western District and the Supreme Court of Missouri are listed in the caption.

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Petitioner prays that a Writ of Certiorari, issue to review the judgment of the Missouri Supreme Court dated November 25, 1997 denying review of the Missouri Court of Appeals Western District Opinion filed September 9, 1997.

## OPINIONS BELOW

The initial decision of the Missouri Court of Appeals Western District dated September 9, 1997, is printed in Appendix A at page A1, and the opinion is officially reported at 954 S.W. 2d 503 (Mo.App.W.D. Mo. 1997). The order denying the motion for rehearing and transfer to the Supreme Court of Missouri by Western District Court of Appeals dated October 28, 1997, is printed in Appendix B at page A13, and is unreported. The order of the Missouri Supreme Court denying the transfer was filed and entered November 25, 1997 and is printed in Appendix C at page A14, and is unreported.

## JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1257 (1948). The United States Supreme Court Rules 10(b) and 10(c) are appropriate standards for review. This Writ is timely filed according to United States Supreme Court Rule 13 within 90 days of the last and final Missouri State Court Order of November 25th, 1997.

## STATUTES INVOLVED

## CONSTITUTION OF THE UNITED STATES OF AMERICA

### AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, with just compensation.

### AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

This Eminent Domain trial involves the condemnation by the Missouri Highway and Transportation Commission for the expansion of M-291 Highway in Sugar Creek, Missouri starting in 1994. Lilly and Danny Mann are hard working truck farmers who have raised, harvested and sold corn, tomatoes, watermelons, pumpkins and other truck farm vegetables and fruits from their property over the last forty years. The Mann's suffered a severe impact condemnation suit wherein 4.5 acres of their 70.42 acre farm was acquired by the Missouri Highway and Transportation Commission by the widening of M-291 Highway. This road project restricted all of the Mann's access directly to the highway; and their produce stand with its parking area was extinguished in the condemnation. In essence, Lilly and Danny Mann lost their livelihood of being vegetable truck farmers directly on the highway. At the trial Mr. Merle Decker, an appraiser of fifty years experience attempted to offer into evidence two critical, relevant and competent comparable sales: The Citywide Asphalt sale and Anderton sale. The importance of these sales was paramount in that the indicated per acre value was $22,000 versus all other comparable sales used by the other appraisers in the range of $2,000 to $8,000. The City Wide Asphalt sale was directly on 291 Highway and the Anderton sale was immediately adjacent to the Mann tract. The trial judge did not allow Mr. Decker to testify about the City Wide Asphalt sale as a comparable sale because the court ruled that Mr. Decker did not properly verify the validity of the sale. The trial judge did not allow Mr. Decker to testify about the Anderton sale because the court ruled the sale was too remote in time. An offer of proof was made that Mr. Decker did in fact establish verification of the City Wide Asphalt sale through another appraiser and an attorney in the sales transaction, which figures were not denied by the seller in a conversation with Mr. Decker. An offer of proof was also made that Mr. Decker's appraisal investigation established that the Anderton sale date twenty-three

years ago was useful and relevant and not remote in time because the marketplace values had not changed over the course of years and the sale price was an accurate indicator of value for the acquisition. The trial court errors impacted the verdict all to the detriment of the landowners and resulted in a taking without just compensation being paid. The jury verdict was $85,000. This amount was $21,000 less than the Commissioner's Award of $106,000. If the jury verdict and judgment is not reviewed by this Court and subsequently reversed, the Mann's will be responsible for paying back the sum of $21,000, plus statutory interest and costs to the Missouri Highway and Transportation Department. The possibility of this judgment standing would be a miscarriage of justice and an extreme hardship on the property owners.

## REASONS FOR GRANTING THE WRIT

I.

**In a Missouri state Eminent Domain action, whether the trial court denied the property owner their fundamental due process constitutional rights for just compensation under the 5th and 14th Amendments of the United States Constitution in not allowing the property owners Expert Appraisal Witness to present competent and relevant valuation testimony of two essential comparable sales. Did such a denial constitute a taking of property without the payment of just compensation?**

The Trial Court erred in not allowing the Citywide Asphalt sale and the Anderton sale into evidence. The basis for denying the Citywide Asphalt sale was that the landowner's appraiser Mr. Decker did not verify the sale with either the seller, buyer, or broker to the transaction based upon the case of *State ex. rel. State Highway Commission v. Jasper*, 544 SW 2d 554 (Mo. 1976)

which limits the verification to these specific parties. The trial court erred in not allowing the Anderton sale because the sale occurred 23 years ago and was too remote in time. A offer of proof was made on both sales showing that Mr. Decker's research in the preparation of his testimony and appraisal established that he did in fact verify the terms of the Citywide Asphalt sale through the appraiser and attorney to the transaction, and the seller did not deny the terms. This verification for the appraisal purposes should have been sufficient under the Missouri Expert Witness Statute Section 490.065 RS (Mo. 1994), and the court holding in *Ryan v. Parter*, 812 SW 2d 190, 194 (Mo. App. W.D. 1991). An offer of proof was further made that the Anderton sale was admissible in Court because Mr. Decker verified that the present real estate market was reflected by this sale. The Anderton sale should have been admitted under the holding of *Shelby County R-IV School District v. Herman*, 392 SW 2d 609 (Mo. 1965). If these two sales were allowed into evidence, the per acre value would have been $22,000 per acre versus $2,000 to $8,000 indicated value by other comparable sales.

The Federal question of property being taken without the payment of just compensation by the exclusion of the Citywide Asphalt and Anderton comparable sales was initially raised at the trial court level (trial transcript, pages 129-132, 249-252, 256-257, 265-267, and 269-270); in the Motion for New Trial (Legal File Document 8, pages 2, 3, 7-8); in the Appellant's Brief in the Missouri Court of Appeals Western District (pages 18-22); in the Motion for Rehearing to the Missouri Court of Appeals Western District (pages 3-5); and the Motion to Transfer to the Missouri Supreme Court (pages 2-5).

In a condemnation proceeding the 5th and 14th Amendment of the Constitution is infringed when there is an "absolute disregard" of the right of the owner to be paid for what is taken. *Chicago, B. & Q. R. Co. V. Chicago,* 166 US 226, 17

S.Ct. 581, 41 L.Ed. 979 (1897). It is a fundamental principal of Constitutional Law that private property cannot be taken without the payment of just compensation. *Pennsylvania Coal Co. V. Mahon*, 260 U.S. 293, 43 S.Ct. 158, 67 L.Ed. 322 (1922). This Court should review the Mann's condemnation case because of the review - worthiness of the due process issues. Condemnation law affects many persons and important public or private institutions. There needs to be definite guidance by this Court on these condemnation issues which are likely to re-occur. Finally, there already exists or conflict or lack of clarity in the existing law that is likely to confuse further condemnation cases involving comparable sales and inspire further avoidable litigation.

According to Supreme Court Rule 10(b), this Supreme Court can review a state court decision of last resort which has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals. According to Supreme Court Rule 10 (c), this Supreme Court can review a state court decision of last resort if an important question of Federal law conflicts with relevant decisions of the Supreme Court.

Recently this Court decided the standard of review for a district court's evidentiary rulings on Expert Witness testimony. *General Electric v. Joiner*,____ US ___, 118 S. Ct. 512, ____, L. Ed. ___ (1997) No. 96-188. This Supreme Court held that the abuse of discretion is the proper standard by which to review a district court's decision to admit or exclude an expert's opinion evidence. Such testimony of Mr. Decker was relevant and reliable according to the *General Electric Supra* decision and Rule 702 of the Federal Rules of Evidence. Granted the trial court is the initial "gatekeeper" in screening the expert's testimony, but nonetheless, especially in "outcome determinative" evidence, great care should be used in excluding testimony that is relevant, reliable, and probative. Clearly Mr. Decker's testimony meets this standard under the Missouri state and federal standards enunciated and

referred herein. There was a clear abuse of discretion and a violation of the Mann's Constitutional right to have just compensation paid for the loss of their property.

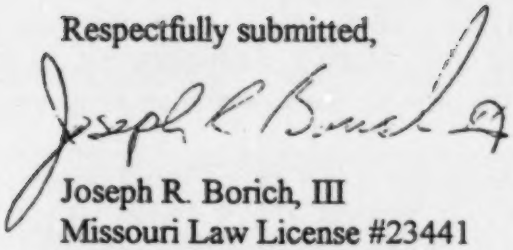
Noteworthy is the case *United States v. 0.161 Acres of land, Etc.*, 837 F. 2d 1036 (CA11, 1988). In that case a ruling the 11th Circuit reversed a district court decision not to allow two comparable sales in evidence in a condemnation suit. As the court stated "wh[illegible] an expert's testimony has a reasonable factual basis, a court should not exclude it. Rather it is for the opposing counsel to inquire into the expert's factual basis," *id* at page 1040. Likewise in the case at bar, and for the same reasons, the Anderton and Citywide Asphalt sales should have been allowed to reach the jury for consideration.

The United States Supreme Court duty and responsibility is to set a unified standard as the final "gatekeeper" of what expert testimony is allowable in a condemnation suit. Otherwise, a property owner's Constitutional right for just compensation for the taking of property can be thwarted by a judge's "abuse of discretion" in restricting this fundamental Constitutional right.

## CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Missouri Supreme Court and Missouri Court of Appeals Western District.

Respectfully submitted,



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**IN THE MISSOURI COURT OF APPEALS**
**WESTERN DISTRICT**

| | | |
|---|---|---|
| **STATE OF MISSOURI, ex rel. MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION, Respondent,** | ) | **WD 52268** |
| **v.** | ) | **OPINION FILED: September 9, 1997** |
| **CLEO SISK, et all. (Exceptions of DANNY and LILLY MANN), Appellant.** | ) | |

**Appeal From the Circuit Court of Jackson County,Missouri**
**Honorable John I. Moran, Judge**

**Before:** Lowenstein, P.J., Spinden and Howard, JJ.

Danny and Lilly Mann appeal from a judgment awarding them $85,000.00 in damages for property acquired through condemnation by the Missouri Highway and Transportation Commission ("the MHTC"). The Manns contend that the trial court erred by failing to strike a venireperson for cause, by striking their appraiser's testimony regarding comparable sales of other properties, by allowing the MHTC to cross-examine Mr. Mann about his prior statements at a commissioners' hearing, and by sustaining pre-trial motions in limine filed by the MHTC.

This case began when the MHTC filed a petition to condemn approximately 4.5 of the Manns' 70.42 acres of farm property in Sugar Creek, Missouri. Court-appointed commissioners filed a report awarding the Manns $106,000.00 for the acquired property, and the Manns filed exceptions to the report, asking that their damages be appraised by a jury.

During voir dire proceedings at the ensuing trial, the Manns' attorney questioned venirewoman Christina Zimmerman -- who worked for an insurance company supervising people who valued insurance claims --about whether her work experience would affect her ability to be fair and impartial in this case:

> Q. Okay. And the fact that there's going to be certain claims like that, and the fact that, you know, the Manns are going to be asking for money for the loss of, you know, or the effect for the loss of some of their improvements and how the acquisition affects their improvements, and the fact that you're in the business of adjusting and they're asking for money, and at Farmer's you're attempting to evaluate if you should give as much money say as a claimant is asking, would that affect your ability to give a fair and impartial verdict for the Manns?
>
> A. No, because I don't handle very many, very little, if at all, homeowner's type of property claims.
>
> Q. Okay. But I've taken it one step beyond that. Even though it's not the exact same thing it's procedurally the same process of asking for money and you maybe determining that --
>
> A. A value.

Q. Exactly. Would the fact that you work for an insurance company and you might, you know, valuate things, certainly affect your ability here to give a fair and impartial verdict?

A. I don't know how to answer that. I think it would probably, because I have knowledge in how to value claims, give a more accurate verdict. I don't know.

Q. So you would bring that knowledge and maybe use what you have in your experience as an adjuster to value this claim and --

A. Right.

Q. -- thank you. So, do you think you could be fair with that knowledge?

A. Yes.

At the close of the voir dire proceedings, the trial court denied the Manns' motion to strike venirewoman Zimmerman for cause, and she was removed from the panel by a peremptory strike.

The first witness to testify on behalf of the Manns was Merle Decker, a real estate appraiser. Mr. Decker stated that he "found enough like properties" to conclude that the pre-acquisition value of the Manns' property was $20,500.00 per acre. He further testified that, prior to the acquisition, the total value of the property was $1,585,000.00, and after the acquisition, the total value of the property was $906,310.00.

After Mr. Decker expressed his opinion that the property was worth $20,500.00 per acre before the acquisition, the Manns' attorney asked him to describe the comparable sales upon which

that figure was based. Mr. Decker first described a 1993 transaction in which Citywide Asphalt sold 328 acres to Waste Management of Missouri for $22,868.00 per acre. The trial court then permitted the MHTC's counsel to conduct a voir dire examination of Mr. Decker concerning that sale. In response to questions from the MHTC's counsel, Mr. Decker explained that he verified the terms of the Citywide Asphalt sale with another appraiser:

> Q. Now, you announced to . . . the jury a few minutes ago that you had verified this sale?
>
> A. Yes.
>
> Q. Okay. And what person was it that you verified the sale with?
>
> A. Tom Ruhl. Tom Ruhl was the appraiser and he took care of both of these, both sides, and I verified with Tom Ruhl. And I know Tom Ruhl, Tom is a personal friend.

The MHTC's counsel then moved to strike Mr. Decker's testimony about the Citywide Asphalt sale on the ground that Mr. Decker failed to adequately verify the terms of the transaction:

> Now, the . . . foremost argument that I have that this sale should not be allowed is that to get the sale done you have to verify it through the buyer -- he said Tom Ruhl was not the buyer, the seller, Tom Ruhl was not the seller, or the broker. He said Tom Ruhl was not the broker, that there was no broker. Therefore, he got this information from the form that he has that was from Tom Ruhl, simply another appraiser. Another appraiser that verifies a sale does not give credibility to him coming in and by hearsay testifying

to what another appraiser told him. And the case law in Missouri does not allow as an exception to hearsay unless the expert witness verifies it was from the buyer, the seller or the broker. He has failed to do that on this sale.

THE COURT: The evidence was he contacted Mr. Ruhl that he knew personally and confirmed the sale price. As an expert, isn't he allowed to rely upon hearsay where it's not [inaudible].

MHTC COUNSEL: But according to case law that just doesn't happen. This is a matter that I've had great success in the past, there are appellate courts here that upheld the fact that unless you get it from the buyer, the seller or the broker, it is not a verified sale. If that's the case that even if you get it from a partner in your appraisal firm that is double hearsay.

THE COURT: Response?

MANN COUNSEL: That's sufficient under Missouri law. There's no question he just verifies Ruhl's opinion.

THE COURT: Simply asking Ruhl --

MANN COUNSEL: Sure. He was the one that did the appraisal, there was no broker on it so he was the closest in time to it. I mean, if they have any information it's not a valid sale I'm sure we're hear later on.

MHTC COUNSEL: Your Honor, my expert witness tried to verify this sale. Those terms are confidential, there's no way Mr. Decker got it.

THE COURT: I'll tell you what. You're probably right and I'll sustain the objection. Now, if he can establish somebody he confirmed these figures I'll let it in though at this point I will sustain the objection and I will strike his testimony at this point.

The trail court then ordered the testimony about the Citywide Asphalt sale stricken, telling the jury that "I am striking from the record this witness testimony concerning statements made to this witness by Mr. Tom Ruhl." The Manns' attorney returned to his examination of Mr. Decker, and the following exchange occurred:

Q. Did you verify this any other way?

A. If I had known that this crisis was coming up here in this courtroom, sir, I could have, very easy. I could've called Waste Management, or went to their office, got the other side of it. And I could've asked Tom Ruhl if he did any of the appraisal work, and he probably did. I imagine that's how --

MANN COUNSEL: Your Honor, we ask time to recess tonight and in the interest of justice I'll have Mr. Decker go ahead and --

THE COURT: You can recall this witness later if you'd like, on this limited issue.

MANN COUNSEL: Okay. We'll come back.

Q. Will you, after you're done tonight and will you go and verify this with the buyer and seller as to the amounts --

A. Yes.

When the trial reconvened the following day, Mr. Decker testified that he spoke with Russell Buhler, the seller of the property, and that Mr. Buhler would not confirm or deny the terms of the sale. Later, the following exchange occurred:

> MHTC COUNSEL: Judge, the problem I have is, again, as an officer of the court, I spoke last evening with Russell Buhler on his car phone, and then for an extended time on his home phone, and I asked him whether or not there were any confidentiality clauses in the sale from Citywide, which he is, to Waste Management. He said absolutely. I asked him whether or not in the past he had ever spoken with anyone by the name of Merle Decker. He said no, I've never heard of him. I said at any time did you talk to a man named Tom Ruhl; he said I've never heard of him. And I said all right, then I'm going to ask you, as if I am any appraiser, if I would ask you tonight whether you would divulge the terms of that sale would you do so. He said absolutely not.
>
> THE COURT: So he wouldn't confirm, wouldn't deny --
>
> MHTC COUNSEL: Wouldn't confirm or deny.
>
> THE COURT: I don't call that a verification --
>
> MANN COUNSEL: Well --
>
> THE COURT: -- from an appropriate source.
>
> MANN COUNSEL: And I believe Merle, that he talked to him after Bill talked to him because Merle, you know, called me about eleven p.m. last night and related

the conversation that he in essence said today. He went over each of the elements of the sale, you know, with him, and there was no denial of it. I mean --

THE COURT: Of course there wouldn't be because it's confidential.

MANN COUNSEL: Yeah, but --

THE COURT: So he can't affirm it, can't deny it --

MANN COUNSEL: Well, those numbers didn't come from nowhere.

THE COURT: No, they came from Ruhl, but we can't consider it. We know where he got the figures, but he couldn't confirm them with the seller, buyer, or broker.

MANN COUNSEL: He confirmed that he, you know, I feel that's more than enough for confirmation purposes.

THE COURT: The fact it was not denied?

MANN COUNSEL: Correct. And the fact that he went over each and every element of it and the seller, who there's no question Merle was in communication with, Mr. Decker said I went over each and every element and it was not denied and the man, Merle's testimony was that the numbers speak for themselves, or the documents speak for themselves. That's what Merle said on the witness stand.

THE COURT:. Okay. Your request to reopen this issue is denied.

The trial court also denied a motion by the MHTC to exclude the entirety of Mr. Decker's testimony.

Later, Mr. Decker described a 1975 transaction in which Pauline Anderton sold 39.4 acres to Polar International for $14,000.00 an acre. The MHTC objected to Mr. Decker's testimony about the Anderton sale on the ground that it was too remote in time, and the trial court ordered the testimony about the Anderton sale stricken. Mr. Decker described three additional comparable sales in support of his appraised value of the Mann property. These included a 1994 transaction in which B.J. Dominique sold four acres to Gulley Transportation for $34,848.00 an acre, a 1986 sale of 362.55 acres to Santa Fe Partnership for $20,000.00 per acre, and a sale of 2.2 acres to the Hunt Midwest Industrial Park for $1.25 per square foot. Mr. Decker's testimony regarding these three comparable sales remained in the record.

Another appraiser, Robert L. Newsome, also testified on behalf of the Manns. Mr. Newsome stated that, prior to the acquisition, the Manns' property was worth $20,000.00 an acre, and had a total value of $1,523,000.00. Mr. Newsome further testified that, after the acquisition, the Manns' property was worth $15,000.00 an acre for a total value of $949,300.00.

A third appraiser, David Miller, testified on behalf of the MHTC. Mr. Miller stated that, prior to the acquisition, the Manns' property was worth $5,263.00 per acre, and had a total value of $392,350.00. After the acquisition, according to Mr. Miller, the Manns' property still had a value of $5,263.00 per acre. However, Mr. Miller testified, because of losses related to a gravel road, a company easement, a produce stand, septic tanks, and the loss of the 4.36 acres being condemned, Mr. Miller calculated the Manns' total damages at $66,688.00. At the close of trial, the jury awarded the Manns $85,000.00 in damages.

In their first point on appeal, the Manns claim that the trial court erred by denying their motion to strike venirewoman Zimmerman for cause. The Manns contend that, because venirewoman Zimmerman believed she had more accurate knowledge of how to value a claim for damages, she could not be a fair and impartial juror in this case. The gist of the Manns' complaint is that they were forced to use one of their peremptory strikes to remove Ms. Zimmerman from the panel.

This point is devoid of merit. In **Rodgers v. Jackson County Orthopedics, Inc., 904 S.W.2d 385, 391 (Mo. App. W.D. 1995)**, this court held that a litigant does not have a right to a new trial on the ground that the trial court erroneously required him to use a peremptory challenge to remove a juror who should have been removed for cause, so long as the jurors who, in fact, sat on the jury were qualified. The Manns make no claim that any of the sitting jurors were unqualified. Point denied.

In their second point on appeal, the Manns claim that the trial court erred in striking Mr. Decker's testimony concerning the Citywide Asphalt sale. The Manns contend that Mr. Decker had properly verified the terms of the transaction, and therefore the evidence of that comparable sale should have been admissible.

The MHTC contends that, in order to testify about a comparable sale which was used in calculating a value for the condemned property, an appraiser acting as an expert witness in a condemnation case must have verified that sale with either the buyer, seller, or broker involved in the transaction. The MHTC argues that Mr. Decker's attempts to verify the sale through another appraiser, Mr. Ruhl, was insufficient because it did not meet this requirement.

An expert testifying on the value of property in a condemnation proceeding may base his opinions in part upon inquiries concerning other sales, even though such sources constitute hearsay and would ordinarily be inadmissible. **State v. Barron, 400 S.W.2d 33, 37-38 (Mo. 1966)**. In such cases, the details of the sales are not offered or admitted as independent, substantive evidence of the value of the subject property, but are used instead as support and background for the expert's own opinion as to the value of the subject property, and the hearsay rules should not be applied to prevent an expert witness from giving the basis of his opinion. **Id. at 38.** However, an expert testifying in a condemnation suit should make careful inquiry into the facts concerning similar sales upon which he bases his opinion as to land values. **Id. at 37.**

Missouri case law offers little guidance as to the kind of inquiry which would satisfy this rule. **State, etc. v. Berkeley School Dist., 618 S.W.2d 195, 196-197 (Mo. App. E.D. 1981)** holds that is insufficient for an appraiser to merely rely upon some unknown person in his office to confirm the data. **State ex rel. State Hwy. Com'n v. Jasper, 544 S.W.2d 554, 555 (Mo. banc 1976)** appears to hold that an appraiser who verifies comparable sales with either the seller, buyer or broker involved in the transaction has made sufficient inquiry for the appraiser to testify about the sale as a basis for his valuation of the subject property. However, **Jasper** does not hold that the broker, seller, or buyer are the only sources from which an expert witness can verify the terms of a comparable sale in order to discuss it at trial.

Surprisingly, neither party on appeal discusses the relationship between these cases and §490.065 RSMmo 1994, which as this court observed in **Ryan v. Parker, 812 S.W.2d 190, 194 (Mo. App. W.D. 1991)**, now governs the admissibility of expert testimony. Section 490.065.3, which has been applied to

expert testimony in condemnation cases (**see State ex rel. MHTC v. Matula, 910 S.W.2d 355, 358-359 (Mo. App. E.D. 1995)**), provides that facts or data upon which an expert bases an opinion may be based upon hearsay sources, but such facts or data "must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable."

Section 490.065.3 would require that, in order for Mr. Decker's testimony regarding Mr. Ruhl to be admissible, the data from Mr. Ruhl, another appraiser, would have to be the kind of source reasonably relied upon by experts in the field, and such data would have to be otherwise reasonably reliable. It would appear from the record that the Manns failed to make such a showing in the case at bar.

A trial court does not usually commit reversible error by mere exclusion of expert testimony, even if the offered testimony was relevant and admissible. **Bruflat v. Mister Guy, Inc., 933 S.W.2d 829, 833 (Mo. App. W.D. 1996).** In condemnation cases, errors in the admission or exclusion of evidence will not result in the reversal of verdicts unless there is substantial and glaring injustice. **State ex rel. State Highway Com'n v. Texaco, Inc., 502 S.W.2d 284, 289 (Mo. 1973); LCRA v. Kansas Univ. & Endowment Ass'n, 797 S.W. 2d 495, 498 (Mo. App. W.D. 1990).** Given the totality of questions surrounding the reliability of Mr. Ruhl's information about the Citywide Asphalt sale and the reasonableness of Mr. Decker's reliance upon that information, it was not a substantial and glaring injustice for the trial court to exclude it, even if the MHTC mischaracterized the law by claiming that Missouri appellate decisions have held that the broker, seller, or buyer are the only sources from which an expert witness can verify the terms of a comparable sale. If a trial court's decision to exclude evidence is correct for any reason, it will be affirmed on appeal. **Destin v. Sears, Roebuck and Co., 803 S.W.2d 113, 117**

**(Mo. App. W.D. 1990).** Furthermore, the exclusion of Mr. Decker's testimony concerning the Citywide Asphalt sale did not create a substantial and glaring injustice because the basis of his opinion of value was established by other evidence. **See State Transp. Com'n v. Buys, 909 S.W.2d 735, 739 (Mo. App. W.D. 1995).** Point denied.

In their third point on appeal, the Manns claim that the trial court erred in striking Mr. Decker's testimony concerning the Anderton sale. The Manns contend that the jury should have been allowed to consider the testimony despite the sale's remoteness in time.

Evidence of the sale price of property which is sold reasonably near the price of the taking is admissible to aid the triers of fact in determining the compensation to which the owner is entitled for the taking of his property, and the trial court has considerable discretion in determining whether this test of admissibility is met. **In re Armory Site in Kansas City, 282 S.W. 2d 464, 473 (Mo. 1955).** The Manns have not made a persuasive argument that the trial court abused its discretion in excluding evidence of the Anderton sale, which occurred twenty years prior to the taking in the case at bar. The Missouri Supreme Court has upheld the exclusion of evidence of a sale similarly remote in time (23 years). **Shelby County R-IV School District v. Herman, 392 S.W.2d 609, 614 (Mo. 1965).** Point denied.

In their fourth point on appeal, the Manns claim that the trial court erred by allowing the MHTC to question Mr. Mann about his testimony at a prior condemnation hearing, where he stated that the amount of damages attributable to the condemnation was $193,275.00. This prior statement was inconsistent with his trial testimony that the damages totaled $738,000.00. The Manns

contend that testimony from a condemnation commissioners' hearing is inadmissible in an ensuing jury trial.

In support of their contention, the Manns cite **State v. Latham, 868 S.W.2d 177 (Mo. App. E.D. 1994),** which merely indicates that evidence of the commissioner's award itself may be objectionable. The fact is that a landowner's prior estimate of damages presented to the commissioners is admissible to show its inconsistency with his testimony at trial, so long as there is no mention or reference to the commissioners' hearing, and so long as the amount of the commissioners' award is not revealed. **State ex rel. City of Warrensburg v. Stroh, 690 S.W. 2d 215, 215-217 (Mo. App. W.D. 1985).** Those safeguards were observed in the case at bar. Point denied.

In their fifth point on appeal, the Manns claim that the trial court erred by sustaining various motions in limine filed by the MHTC. Of course, a ruling on a motion in limine is interlocutory and hence its denial cannot constitute reversible error. **Ball v. American Greetings Corp., 752 S.W.2d 814, 824 (Mo. App. W.D. 1988).** Furthermore, in their ensuing argument, the Manns make no serious effort to explain on what specific legal grounds the excluded evidence was admissible. Point denied.

The judgment of the trial court is affirmed.

Victor C. Howard, Judge

All concur.

# Missouri Court of Appeals

Western District
1300 Oak Street
KANSAS CITY, MISSOURI 64106-2970

October 28, 1997

## IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE OF MISSOURI, EX REL.,
MISSOURI HIGHWAY AND TRANSPORTATION COMM., RESPONDENT

vs.

SISK, CLEO, ET AL., EXCEPTIONS OF
MANN, DANNY L., ET AL., PARA. 15.00, TRACT 27,
APPELLANT

WD# 52268

Please be advised that Appellant's motion for rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.03.

TERENCE G. LORD
CLERK DOCKET ATTORNEY

cc: William David Farrar
Joseph R. Borich, III

**Missouri Court of Appeals**
Western District
1300 Oak Street
KANSAS CITY, MISSOURI 64106-2970

January 7, 1998

| | | |
|---|---|---|
| STATE OF MISSOURI, ex rel. MISSOURI HIGHWAY AND TRANSPORTATION COMMISSION, Respondent, | ) | WD 52268 |
| v. | ) | OPINION FILED: September 9, 1997 |
| CLEO SISK, et al (Exceptions of DANNY and LILLY MANN), Appellant. | ) | |

Please be advised that the following correction has been made in the opinion in the above-styled case found in Volume 954 of the South Western Reporter, 2d Series:

Page 509, second column, line 16 from the bottom:

Reads: near the price
Should read: near the time

Please make this correction to your copy of the opinion. Thank you.

Very truly yours,

Terence G. Lord
Clerk - Docket Attorney

cc: West Publishing Company
LOIS
William D. Farrar
Mead Data Central
Shepard's
Joseph R. Borich, III

Appendix D
A18

IN THE SUPREME COURT OF MISSOURI
No. 80363
W.D. No. 52268

September Session, 1997

State of Missouri, ex rel,. Missouri
Highway and Transportation Commission Respondent

vs. (TRANSFER)

Cleo Sisk, et al. (Exceptions of Danny and
Lilly Mann). Appellants

Now on this day, on consideration of appellants' application from the Missouri Court of Appeals, it is ordered that said application be and the same is hereby denied.

STATE OF MISSOURI - Sct.

I, Thomas F. Simon Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the September Session 1997, and on the 25th day of November, 1997, in the above-entitled cause.

Given under my hand and seal of
said Court at the City of Jefferson,
this 25th day of November, 1997.

"s/Thomas F. Simon"